92-1223

(1)

Supreme Court, U.S.
JAN 6 1993
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1992

WILLIAM D. SANDERS,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES D. CAUSEY, Counsel of Record
230 Adams Avenue
Memphis, Tennessee 38103
(901) 526-0206

Attorney for Petitioner,
William D. Sanders

A. QUESTIONS PRESENTED FOR REVIEW

(1) Whether or not there was probable cause for the stopping of Sanders' vehicle?

(2) Whether or not what transpired, according to the proof, shows that the stated reason for the traffic stop was, in fact, a pretext for an unauthorized search and seizure?

(3) Whether or not the Affidavit in support of a search warrant application establishes sufficient probable cause?

(4) Whether or not the good faith exception to the exclusionary rule should apply to the search of the Sanders' residence?

B. PARTIES TO THE PROCEEDINGS

Ed Bryant and Van Vincent, United States Attorney and Assistant United States Attorney, represented the United States of America before the District Court for the Western District of Tennessee, Western Division. Mr. Bryant and Joseph C. Murphy, Jr. represented the Government before the Court of Appeals for the Sixth Circuit.

At the District Court level, James D. Causey and Emmett R. Hall, III served as defense counsel for William D. Sanders. Mr. Causey represented Mr. Sanders through the appeal to the Court of Appeals for the Sixth Circuit.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

Page

(1) TABLE OF CONTENTS

(a) Questions presented 1

(b) Parties to the proceedings 2

(c) Table of Contents and Table of Authorities . . . 3

(i) Table of Contents . . 3
(ii) Table of Authorities . 4

(d) Opinions below 6

(e) Jurisdictional Statement. . 7

(f) Constitutional and Statutory Provisions . . . 8

(g) Statement of the Case . . . 9

(h) Argument 31

(i) Conclusion 60

(j) Certificate of Service . . 61

(k) Appendix (Separately presented)

(2) TABLE OF AUTHORITIES

CASES PAGE

Brown v. Texas,
443 U.S. 47 (1979) 43

Collins v. State,
65 So.2d 61 (Fla. 1953) . . . 40, 48

Delaware v. Prouse,
440 U.S. 648 (1979) . . . 33, 35, 43

Franks v. Delaware,
438 U.S. 154 (1978) . . . 10, 53, 58

Illinois v. Gates,
462 U.S. 213, rehearing
denied, 463 U.S. 1237 (1983). . . 54

Sgro v. United States,
287 U.S. 206 (1932) 55

State v. Blair,
691 S.W.2d 259 (Mo. 1985) 47

Terry v. Ohio,
392 U.S. 1 (1968) 35

United States v. Brignoni-Ponce,
422 U.S. 873 (1975) 36

United States v. Cortez,
449 U.S. 411 (1981), rehearing
denied, 455 U.S. 1008 (1982) . . 37

United States v. Guzman,
864 F.2d 1512 (10th Cir. 1988). . 42

United States v. Leon,
468 U.S. 897, rehearing denied,
468 U.S. 1250 (1984) 57

United States v. Miller,
821 F.2d 546 (11th Cir. 1987) . . 47

United States v. Ross,
456 U.S. 798 (1982) 32

United States v. Smith,
799 F.2d 704 (11th Cir. 1986) 34, 43

STATUTES AND OTHER AUTHORITIES

Fourth Amendment to the
United States Constitution . . 36, 41, 43

Fourteenth Amendment to the
United States Constitution 36

Rule 12 of the Federal Rules
of Criminal Procedure 8

Rule 41 of the Federal Rules
of Criminal Procedure 8

Rule 10 of the Rules of the
United States Supreme Court . . . 31, 32

D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit has not been recommended for full text publication. A copy of the Opinion is included in the Appendix, separately presented.

E. JURISDICTIONAL STATEMENT

(1) The judgment sought to be reviewed was decided and filed October 11, 1991.

(2) The Defendant did not file a Petition for Rehearing En Banc nor has Defendant petitioned for an extension of time within which to file his Petition for Certiorari.

(3) The Petitioner anticipates no cross-petition for certiorari.

(4) The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

F. RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

(1) Fourth Amendment to the United States Constitution

(2) Fourteenth Amendment to the United States Constitution

(3) Rule 12 of the Federal Rules of Criminal Procedure

(4) Rule 41 of the Federal Rules of Criminal Procedure

G. STATEMENT OF THE CASE

1. Statement of the Case

On April 9, 1990, the United States District Court for the Western District of Tennessee returned an indictment against William D. Sanders. Count I alleged that he unlawfully, knowingly and intentionally possessed with the intent to distribute approximately 90 grams of methamphetamine in violation of Title 21 U.S.C. §841(a)(1). Count II charged Mr. Sanders with knowingly and intentionally carrying and using a firearm, during and in relation to a drug trafficking crime in violation of Title 18 U.S.C. §924(c).

On May 1, 1990, Sanders filed a Motion to Suppress. The Defendant moved the Court to suppress all evidence obtained as a result of the unlawful arrest and search of the Defendant while operating his ve-

hicle on March 9, 1990 in Obion County, Tennessee. He further moved for suppression of all evidence obtained as a result of the subsequent search of his residence.

On May 14, 1990, the Honorable Julia Smith Gibbons referred the Motion to Suppress Evidence to the Magistrate for hearing.

On August 29, 1990, Magistrate James Allen presided over the suppression hearing. On September 13, 1990, Magistrate Allen filed his Proposed Findings of Fact, Proposed Conclusions of Law and Recommended Disposition, denying ~~the~~ Defendant's Motion to Suppress.

Defendant filed a Motion to Amend and Supplement Motion to Suppress Pursuant to Franks v. Delaware, 438 U.S. 154 (1978), which the Court denied.

Sanders entered a plea of guilty to Count I. The Court took an Alford plea with respect to Count II.

On February 11, 1991, the Defendant filed his Notice of Appeal.

The Court entered its Judgment on February 14, 1991, finding the Defendant guilty of the following offenses: possession with intent to distribute a Schedule II controlled substance (methamphetamine) and use and carrying of a firearm during and in relation to a drug trafficking crime. The Court sentenced Mr. Sanders to one hundred and six (106) months.

On October 11, 1991, the Sixth Circuit affirmed the District Court's decision.

2. Statement of the Facts

The United States called the following witnesses at the suppression hearing: Bart McIntyre, Jerry Vastbinder, Larry Ross and Nickie Sadler. The Defendant testified in

his own behalf and also introduced a video tape.

a. Testimony of Bart McIntyre, Special Agent, Bureau of Alcohol, Tobacco and Firearms.

On March 9, 1990, Agent McIntyre met with Larry Ross, Barry Callahan, Jerry Vastbinder, and Nickie Sadler, officers with various law enforcement agencies who had agreed to conduct surveillance on a residence on Wolf Creek Road in Obion County, Tennessee. According to "surveillance information" the residence may have been involved in drug trafficking operations.

Agent McIntyre and Agent Callahan, also with the Bureau of Alcohol, Tobacco and Firearms, conducted the surveillance from a wooded area. At approximately five-thirty or a quarter to six, Agent McIntyre observed a pickup truck at the

house. The man and woman occupying the truck stayed ten or fifteen minutes and then left.

Around seven-thirty or a quarter to eight, a second pickup truck arrived with two males and a large dog. After approximately twenty minutes, both men exited the house carrying beer bottles in their hands. They urinated in the front yard of the house.

At approximately 8:30, Sanders left his residence by truck.

On cross-examination, Agent McIntyre testified that he had receive a "phone call from another law enforcement agency" and nobody requested that he do the surveillance based on their information. His agency determined that an investigation needed to be performed. The Government objected when defense counsel asked who related the information to him. The Mag-

istrate overruled the objection. Agent McIntyre testified that information was received from the Drug Enforcement Administration. When asked who (sic) the Drug Enforcement Administration was, the witness objected to answering because there was an ongoing investigation. The Court did not permit the defense to follow this line of questioning.

Agent McIntyre testified that he did not know Sanders' identity until he was arrested, although he knew that the house was occupied by a member of the Hell's Angels. Agent McIntyre then testified that Lt. Vastbinder stated that Vastbinder had information that a Mr. Sanders in the McConnell Community on Wolf Creek Road had been distributing narcotics. The Government objected to the defense's inquiry as to how many people were involved in the investigation. In ruling on the objec-

tion, the Magistrate stated: "I'm not going to consider any of this information that he had before he set up this surveillance as being the basis for probable cause." The defense, however, persisted in its inquiry into the registration on the vehicles observed in front of the residence. The Court ruled that, if the Government took the position that it could not reveal the names of the individuals visiting Sanders' home, then the presence of the vehicles as an element of probable cause could not be considered because the Defendant was entitled to come forward and say that these people were there for an innocent reason. The Court further ruled that the Government's objection was overruled and that counsel for the Defendant could proceed with this line of questioning. If, however, counsel for the Government directed a wit-

ness not to answer the question, then the Court would not consider the information of the vehicles or their presence there as being part of the probable cause.

b. Testimony of Jerry Vastbinder, Criminal Investigator, Obion County Sheriff's Department.

Vastbinder did not perform the actual surveillance of the house, as he and Deputy Nickie Sadler were positioned to the west of the house. Either Ross or Kildee radioed Vastbinder and Sadler with information that there was a vehicle heading east. Ross and Kildee followed the vehicle.

Trooper Ross radioed Vastbinder and Sadler, requesting that Vastbinder and Sadler catch up with him to stop the vehicle.

Vastbinder and Sadler caught up with Ross and Kildee at the South Fulton City

Limits. Vastbinder observed that Sanders was turning left off 45 East onto the Highway 45 Bypass around South Fulton.

Vastbinder passed a couple of vehicles. When he reached the vehicle carrying Ross and Kildee, Ross pulled over to let him pass. Vastbinder testified that the vehicle driven by Sanders went off the right side of the road, crossing the sideline several times. Vastbinder further testified that Sanders' vehicle tailgated the vehicle in front of him. Vastbinder testified that he felt that Sanders was driving under the influence. Vastbinder turned on the blue light and pulled Sanders over at the intersection of Highway 51 and the Bypass.

Deputy Sadler approached Sanders' vehicle and asked him to step from the vehicle back to Vastbinder. Sanders walked toward the back of his truck. Vastbinder

asked him for his driver's license. Sadler informed Vastbinder that Sanders had a gun in the seat. Vastbinder placed Sanders under arrest for possession of an unlawful weapon. The officers did not run a field sobriety test on Sanders. Vastbinder did not give him a ticket for driving under the influence, reckless driving, crossing lanes, speeding, tailgating, following too closely, or any other traffic offense. Sanders had a valid driver's license.

Vastbinder testified that he followed Sanders' vehicle for two miles, and all of that time, Ross was also following it. Vastbinder travelled behind Ross. When he passed Ross, he followed Sanders for perhaps a quarter of a mile. He testified that, prior to that time, he had seen Sanders move out of his lane. He did not see him cross the center line nor could he

recall the vehicle in front of Sanders. He could not testify as to how close Sanders' vehicle was to the vehicle preceeding him. Sanders' vehicle did not strike the vehicle in front of him nor did the vehicle speed up to get out of the way. There was no flashing of lights between them. Vastbinder testified that the speed limit is fifty-five at the place of the stop.

Prior to the surveillance, Vastbinder had been by the house and knew that Sanders lived there. He had checked tag numbers on vehicles at the house. Counsel for the Defendant asked to whom the tag numbers were registered. The Government objected. The Magistrate sustained the objection to the line of questioning in regard to tag numbers of persons visiting the Sanders' residence prior to the date of the arrest.

c. Testimony of Larry Ross, Trooper,

Tennessee Highway Patrol.

Trooper Larry Ross and Agent Wayne Kildee were parked approximately one-half mile from the house under surveillance. They had radio contact with the surveillance team and also had radio contact with other Sheriff's Department units. Ross' directions were to follow and identify vehicles leaving the target area by tag or by the occupants of the vehicles. Ross testified that he did not know William Sanders prior to March 9, 1990.

When Sanders left his home the evening of March 9th, Trooper Ross followed Sanders' vehicle, travelling approximately three or four hundred yards behind Sanders He testified that Sanders was driving in an erratic manner, slamming on the brakes of his vehicle and slowing down. Ross stated that the vehicle ran off the right side of the road several times and crossed the cen-

ter line several times. Ross radioed the County unit carrying Vastbinder and Sadler that he needed to make a traffic stop. Before Vastbinder and Sadler caught up with him, Sanders' vehicle turned left, headed west onto the 45 Bypass.

Trooper Ross pulled off to the side of the road and stopped approximately a quarter of a mile behind Vastbinder. Vastbinder and Sadler radioed Ross after a minute or two that the individual was armed and they had placed him under arrest.

Ross requested Vastbinder's help because Ross drove a van. Although the van had a blue light, he anticipated difficulty identifying himself and his companion as police officers. Vastbinder was in a plain car.

On cross-examination, Trooper Ross testified that the various law enforcement officials had a meeting prior to the sur-

veillance. They placed Sanders' home under surveillance because Sanders had been with the Hell's Angels. Ross testified that everyone in the group knew of Sanders' affiliation with the Hell's Angels.

Ross could not recall if he and Agent Kildee approached close enough to Sanders' vehicle to obtain the tag number. Other traffic on the road prevented him from obtaining that information. Ross testified that Sanders travelled at least five or six hundred yards ahead of his vehicle, and at least the length of two football fields separated them. There was traffic between Ross' vehicle and Sanders' vehicle. Ross did know the grade of the road. He conjectured that it was fairly level at that area. He had travelled three, four or five miles on 45 before he called Vastbinder.

Ross could not testify how fast Sanders' vehicle was traveling. Ross did not know whether Sanders' lights were bright or dim. Sanders did not run anyone off the road or hit anyone. To Ross' knowledge, Sanders did not exceed the speed limit. Ross stated that Sanders left the paved portion of the highway and Sanders' vehicle ran off the right side of the road. Ross did not charge Sanders with any traffic offense.

Ross actually wrote the Search Warrant although its composition was a joint effort. Sadler told Ross that, upon approaching the vehicle, he observed a revolver in the holster on the front seat next to Sanders.

Ross and Vastbinder approached Judge Hayes at his residence the evening of March 9th around midnight to obtain a Search Warrant for Sanders' residence.

d. Testimony of Nickie Sadler, Deputy Sheriff, Obion County Sheriff's Department.

Deputy Nickie Sadler was positioned on the west side of Sanders' house on March 9, 1990.

When Sadler received the call from Ross, he proceeded to 45 Highway to assist. According to Sadler, Ross was in a vehicle with no emergency lights and no way to stop Sanders' vehicle.

Approximately a mile before Sanders reached the City Limits of South Fulton, Kentucky, Sadler came in visual contact with Sanders' vehicle. Sanders turned off 45 onto the 45 Bypass. Sadler allegedly could see Sanders' vehicle travelling down a long grade, taillights coming on and going off, with the truck leaving the righthand side of the road. Several cars separated Sadler's vehicle from Sanders' truck.

After Sadler stopped Sanders' vehicle, Sadler approached the driver's side, asked for the gentleman's identification, and told Sanders why he was stopping him. Sadler then asked Sanders to step from his truck to the back of the truck, where Vastbinder was standing. Sadler testified that Sanders produced his identification after he stepped to the back of the truck. Sadler handed the driver's license to Vastbinder. Sadler testified that he stopped the vehicle because he thought the driver was driving under the influence. When Sanders exited his truck, Sadler looked into the front seat of the truck and saw a weapon, laying on the truck seat.

The gun was in a holster partially hidden, positioned next to where Sanders had been sitting. Sadler advised Vastbinder of the weapon. Vastbinder placed Sanders under

arrest. Sanders was handcuffed, searched and placed in the patrol car.

Sadler first testified that he did not have any briefing prior to the surveillance. He then testified that he was briefed on what he was doing and that the various law enforcement officers were there for surveillance and for gathering information on a suspected person. Sadler identified the suspected person as Sanders. Sadler did not know where Sanders lived but the information was made available to him at the briefing. Sadler was there to gather information about drugs or vehicles coming and going.

Sadler could not tell how fast Sanders was driving. Sadler could only see the vehicle in front of Sanders and Sanders' brake lights coming on and going off. Sadler did not know if Sanders' headlights were on dim or bright or how close he was to the

vehicle in front of him. Sadler saw Sanders leaving his lane about three times. Sadler did not see Sanders cross over the center line. Sadler did not see Sanders leave the pavement when he crossed the fog line on the right hand side of the road. When Sadler and Vastbinder pulled behind Sanders and turned on the blue lights, Sanders promptly pulled to the right side of the road. The law enforcement officers stopped about two car lengths behind Sanders' pickup truck. Sadler told Sanders that his driving was erratic and asked to see his driver's license. Sadler asked Sanders what his problem was. Sanders replied that he didn't have a problem. He asked Sanders if he had had anything to drink. Sadler believed that Sanders stated that he may have had a beer earlier that afternoon. Sadler did not smell any alcohol on Sanders. Sadler told Sanders to step to the rear of the

vehicle where the other officer was standing. As Sanders walked to Vastbinder, Sadler did not note any indication that Sanders was intoxicated. Sadler did not charge Sanders with intoxication. Sanders was not charged with any traffic offense.

Sadler then stepped to the open door of the truck. Sadler allegedly saw the weapon laying in the seat of the truck. He did not see a revolver on the front seat next to Sanders when Sanders occupied the truck.

Sadler handcuffed Sanders. He took Sanders to the patrol car and placed him in the back seat. Sadler then continued to search the truck, finding a plastic bag with a white powdery substance in the front pocket of Sanders' shirt lying on the floor. He found some green leafy material believed to be marijuana in a brown zip up bag and a cigarette case containing a

marijuana cigarette. No one helped Sadler with the search. Ross and Kildee arrived after Sadler had handcuffed Sanders.

e. Testimony of William Sanders.

William Sanders testified on his own behalf. He lived at Route 2, Box 105, South Fulton, Tennessee, in a home he inherited from his grandfather. At his attorney's request, he drove a vehicle accompanied by a passenger operating a video camera. They taped the area from his home to the place where he was arrested on March 9, 1990.

From his driveway to 45 Highway is seven-tenths of a mile. The video tape showed the turn North onto 45 going toward South Fulton. The highway is a two lane highway with fog lines and a white center line with a broken yellow line indicating where a vehicle can pass and where it can not pass. The speed limit is

fifty-five (55) miles per hour on Highway 45 but, as the City Limits of South Fulton approach, there is a forty-five (45) miles per hour zone.

Sanders testified that he intended to exit onto Highway 51. He indicated the place where he was stopped. He was a couple of hundred yards, if that far, from the Kentucky state line.

He testified that he did not violate the speed laws. He did not weave in and out of traffic, nor did he weave over the center or side lines. He testified that he did not violate any driving rules nor was he under the influence of any intoxicant.

ARGUMENT

According to Rule 10 of the Rules of the United States Supreme Court, the following list indicates the character of reasons that will be considered in granting a review on certiorari:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court,

> or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Petitioner, William D. Sanders, respectfully insists that the case before this Court satisfies the requirements of subsections (a) and (c) of Rule 10.

For the following reasons, the Petitioner further submits that the District Court and the Court of Appeals erred.

A.

THERE WAS NOT PROBABLE CAUSE FOR THE STOPPING OF SANDERS' VEHICLE

Law enforcement officers may conduct a warrantless search of an automobile if there exists probable cause to believe that the vehicle contains contraband. United States v. Ross, 456 U.S. 798, 808 (1982). The probable cause element is tested according to the same standard as if officers were seeking a warrant. That is, "the probable-cause determination must

be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers." Id. at 808. The stopping of an automobile and detaining its occupant constitutes a seizure within the meaning of the Fourth and Fourteenth Amendments, even though the purpose of the stop is limited and the resulting detention is brief. Delaware v. Prouse, 440 U.S. 648, 653 (1979).

In the case before this Court, Defendant Sanders contends that his operation of his motor vehicle was at all times reasonable and prudent and that all vehicular movements were made safely and with due regard for speed and traffic conditions. At the suppression hearing, Sanders denied violating any driving rules or driving under the influence.

Assuming for the sake of argument only that the law enforcement officials observed Sanders weaving in his lane and tailgating the vehicle in front of him, the Defendant submits that Lt. Vastbinder and Deputy Sadler would not have stopped Sanders' vehicle but for their desire to search the vehicle. "[T]he proper inquiry is whether a reasonable officer would have made the seizure in the absence of illegitimate motivation." United States v. Smith, 799 F.2d 704, 708 (11th Cir. 1986) (emphasis in original).

Absent probable cause upon which to base the conduct of Ross, Vastbinder and Sadler, the Government must demonstrate either voluntary consent by the Defendant or an objective factual basis for an investigatory stop. The search of Sanders' vehicle was not made by voluntary consent of the Defendant. Therefore, the Defen-

dant challenges the basis for the initial stop by Vastbinder as lacking in an objective factual basis.

Although law enforcement officers may, even without probable cause under certain circumstances, be warranted in briefly stopping individuals for limited purposes, such an investigative stop requires specific and articulable facts which taken together with rational inferences from those facts reasonably warrant a belief that the safety of the officer or of others is in danger. Terry v. Ohio, 392 U.S. 1, 21 (1968). In Delaware v. Prouse, 440 U.S. 648 (1979), the Supreme Court determined that a police officer who stopped the defendant without observing any traffic or vehicle equipment violation or any suspicious activity but who made the stop only to check the driver's license and

registration of the vehicle violated both the Fourth and Fourteenth Amendments. Further, in United States v. Brignoni-Ponce, 422 U.S. 873 (1975), the Supreme Court found that officers of the Border Patrol may stop a vehicle only if they are aware of specific, articulable facts together with rational inferences from those facts which reasonably warrant suspicion that the vehicle contains aliens who may be illegally in the country. The Court stated that each case turns on the totality of the particular circumstances and listed specific potential factors for consideration. Id. at 884-885.

In a case involving another border search, the Supreme Court identified two elements of the particularized suspicion necessary for the justification of an investigatory stop: (1) "the assessment must be based upon all the circumstances";

(2) the assessment "must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." United States v. Cortez, 449 U.S. 411, 418 (1981), rehearing denied, 455 U.S. 1008 (1982). An examination of the observations of Ross, Vastbinder and Sadler tested fairly and reasonably provides no basis for believing that Sanders was engaged in wrongdoing. Sanders operated his vehicle within the speed limit. At no time did his vehicle pose a traffic or safety hazard. There was no basis upon which to justify a stop in the case before this Court.

In the case before this Court, Ross, Vastbinder and Sadler alleged that Sanders was weaving in his lane and tailgating the car in front of him. Ross, however, testified that at least two football fields separated his vehicle from Sanders' vehicle. In addition, traffic separated

the vehicles. Not only did traffic separate Vastbinder's and Sadler's vehicle from Sanders' vehicle but the van carrying Ross and Kildee also separated Vastbinder and Sadler from Sanders.

Vastbinder did not observe Sanders cross the center line. He could not recall the type of vehicle in front of Sanders or how close Sanders drove to the vehicle. Sadler could not recall this information either. Ross could not estimate the speed of Sanders' vehicle. Ross stated that Sanders crossed the right hand side of the road; however, Sadler did not observe Sanders leave the pavement when he crossed the fog line on the right hand side of the road. Sanders did not strike the vehicle in front of him. The vehicle did not speed up to get out of Sanders' way. There was no flashing of lights between the two vehicles. No one test-

ified that Sanders attempted to pass the vehicle in front of him.

After the stop, Sanders presented a valid driver's license. Sadler detected no alcoholic smell on Sanders. Sanders did not behave suspiciously nor did he offer any threat. None of the officers involved performed a field sobriety test on Sanders. He was not given a ticket for crossing lanes, speeding, tailgating, following too closely or any other traffic offense. Moreover, the incident took place at night on a dark and rural highway when traffic was heavy.

If a vehicle operated within the speed limit and in a safe fashion can be stopped for weaving across the right fog line, then every automobile in traffic is subject to stop at any time. If weaving a couple or even a few times across the fog line is sufficient without more to justify

a stop, then a number of innocent travelers are subject to stop by the police. As the Supreme Court of Florida observed in Collins v. State, 65 So.2d 61, 61 (Fla. 1953):

> "A holding that such a feeble reason (driving over the center line of a highway three times within a mile) would justify a halting and searching would mean that all travelers on the highway would hazard such treatment, for who among them would not be guilty of crossing the center so much as a foot from time to time. All could, therefore, be subjected to inconvenience, ignominy, and embarrassment on the excuse that an occasional incident might yield some contraband or another."

In the case before this Court, the officers did not possess an articulable basis for suspecting criminal behavior on Sanders' part or possession of contraband. They had no reason to fear for their own safety. While they knew that Sanders was a member of the Hell's Angels Motorcycle Club, this knowledge did not constitute

probable cause to stop and search him. In the case before this Court, the warrantless search of Sanders' vehicle was conducted for the purpose of discovering evidence and was, therefore, per se, unreasonable.

B.

THE STATED REASON FOR THE TRAFFIC STOP WAS, IN FACT, A PRETEXT FOR AN UNAUTHORIZED SEARCH AND SEIZURE

Even if this Honorable Court finds that Vastbinder could reasonably have stopped the Defendant's pickup consistent with Fourth Amendment requirements, Defendant submits that a reasonable officer would not have made the stop in the absence of an illegitimate motivation, that is, the hope without a reasonably sufficient factual basis of catching a drug dealer or courier.

> "A pretextual stop occurs when the police use legal justi-

fication to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop. The classic example, presented in this case, occurs when an officer stops a driver for a minor traffic violation in order to investigate a hunch that the driver is engaged in illegal drug activity."

". . . an objective test that asks no more than whether some set of facts might justify a given stop would permit arbitrary instrusions in situations such as a traffic stop. Under such a test, thousands of everyday citizens who violate minor traffic regulations would be subject to unfettered police discretion as to whom to stop. To paraphrase one commentator, in the absence of standardized police procedures that limit discretion, whether we are simply allowed to continue on our way with a stern look, or instead are stopped and subjected to lengthy and intrusive interrogation when we forgot to wear our seat belts, turns on no more than 'the state of the digestion of any officer who stops us or, more likely, upon our obsequiousness, the price of our automobiles, the formality of our dress, the shortness of our hair or the color of our skin." United States v. Guzman, 864

F.2d 1512, 1515, 1516 (10th Cir. 1988).

This kind of arbitrary conduct is unreasonable under the Fourth Amendment. The Supreme Court has previously forbidden certain police practices which are not amenable to objective review based upon the need to restrain this arbitrary exercise of discretionary police power. In Brown v. Texas, 443 U.S. 47, 52 (1979, the Supreme Court stated:

> "[W]hen . . . a stop is not based upon objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits."

In Delaware v. Prouse, 440 U.S. 648, 661 (1979), the Supreme Court stated:

> "[S]tandardless and unrestrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed."

The leading pretextual stop case is United States v. Smith, 799 F.2d 704 (11th

Cir. 1986). In that case, the suspect was pulled over after weaving a total of three times, at least one of which was across the white painted edge line of the interstate. Applying an objective test considering the circumstances, the Eleventh Circuit found that a reasonable officer would not have stopped the suspect's vehicle for a traffic investigatory purpose absent an additional and invalid purpose.

In the case before this Court, the Defendant respectfully submits that the law enforcement officers stopped him on a pretext. According to Agent McIntyre, he planned at least a two week surveillance of Sanders' home. Law enforcement officials were to identify as many people coming and going as possible. A man and woman came to the house and stayed ten to fifteen minutes. Yet, the law enforcement officers did not follow and identify them. Two men

with a large dog came to the home and stayed twenty minutes. They exited with beer bottles in their hands and urinated in the front yard. Yet, the law enforcement officers did not follow and identify them.

The various law enforcement officers' testimony as to Sanders' identity prior to the surveillance was conflicting. Agent McIntyre testified that he did not know Sanders' identity prior to the surveillance. He only knew that a member of the Hell's Angels occupied the home. The law enforcement officers agreed that there was a meeting before the surveillance. Trooper Ross testified that he knew Sanders was a Hell's Angel and so did the other law enforcement officials attending the meeting. Ross knew that Sanders lived in the house under surveillance and drove a red pickup truck. At first, Sadler testified that there was no briefing prior to the

surveillance. He then said that there was a meeting and that the purpose of the surveillance was to gather information on a suspected person Sanders. Sanders and Vastbinder had met several years earlier when Vastbinder worked at a Harley Davidson store.

Trooper Ross testified that Sanders was driving erratically; however, he made no attempt to stop him but rather called Vastbinder and Sadler to stop him. Sadler testified that Ross' van had no emergency lights and, therefore, could not stop Sanders; however, Ross, in prior testimony, testified that the van had a blue light. Sanders was stopped a couple of hundred yards, if that far, from the Kentucky State Line.

The video tape of the route taken by Sanders did not match the descriptions given by Vastbinder, Ross and Sadler.

Although Vastbinder and Sadler allegedly stopped Sanders because of the way he was driving, he was not ticketed for a traffic offense. He produced a valid driver's license. He had no alcoholic smell and was not given a field sobriety test.

Only after Sadler ordered Sanders from the truck did he see a pistol.

The following decisions are analogous to the present case. In United States v. Miller, 821 F.2d 546 (11th Cir. 1987), the defendant allowed his right wheels to cross over the white line painted marker about four inches in violation of Florida traffic laws. The Court held that the stop was pretextual and that it was made because of an apparent hope to catch a drug courier and not because of traffic violations. In State v. Blair, 691 S.W.2d 259 (Mo. 1985), the arrest of the defen-

dant for parking violations was held to be a subterfuge or pretext to gather evidence of the unrelated crime of homicide. In Collins v. State, 65 So.2d 61 (Fla. 1953), the Court held that driving over the center line of the highway on three occasions within a mile was not a violation of Florida law and hence did not justify a stop and search.

The Defendant submits that the facts and circumstances of this case strongly suggest that the alleged traffic violations observed by the officers were, in fact, merely a pretext to stop Sanders' vehicle.

Because there was no probable cause to stop Sanders' vehicle and the stop was merely a pretext to search his vehicle for evidence of illegal activities, the Defendant respectfully submits that all evi-

dence found during the search should have been suppressed.

C.

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT APPLICATION DOES NOT ESTABLISH SUFFICIENT PROBABLE CAUSE

In addition to suppression of any evidence gathered in the search of the vehicle, the Defendant seeks the suppression of any and all evidence obtained as a result of the March 10, 1990 search of his Obion County home. Defendant Sanders bases this argument on the fact that the Affidavit in support of the search warrant application is fatally lacking in sufficient indicia of probable cause.

The first paragraph of the Affidavit in support of the search warrant is set out in its entirety as follows:

"On 3/9/90, law enforcement officers began a surveillance on the residence of William Sanders located at Route 2, Box 105, Wolf Creek Rd., McConnell Community, Obion County, Tenn. William Sanders is known to law enforcement officers to be a member of the Hell's Angels motorcycle club, Kentucky Chapter. Lt. Jerry Vastbinder received information within the past two months that a Sanders' resident on Wolf Creek Road in the McConnell Community was dealing in narcotics and stolen property. Lt. Vastbinder further has conducted drive by surveillances of the residence of Sander and recorded several vehicle registrations of the vehicles parked at the residence. Upon checking the registrations of the vehicles, Lt. Vastbinder determined that several of the registered owners were reported to be involved in drug trafficking in the Obion County area."

At the hearing, Agent McIntyre testified that he had received surveillance information that the Sanders' residence may have been involved in drug trafficking. The Magistrate repeatedly prevented the defense from delving into the information which prompted McIntyre's investigation.

The Magistrate stated that he would not consider any information available to McIntyre before he set up surveillance as a basis for probable cause. He stated that the presence of vehicles at the Sanders' residence would not be considered a basis for probable cause. The Court would not allow the defense to question Lt. Vastbinder as to tags he had observed on cars at the Sanders' residence in his drive-by surveillance prior to the March 9, 1990 surveillance. Despite these rulings, the Magistrate's Proposed Findings of Fact, Proposed Conclusions of Law, and Recommended Disposition contained the following language, at Paragraph 18:

> "18. The Affidavit for this search warrant outlined the above mentioned surveillance. It also stated the following: 'Lt. Vastbinder further has conducted drive-by surveillances (sic) of the residence of Sanders and recorded several vehicle registrations of the vehicles parked at the residence.

> Upon checking the registrations of the vehicles, Lt. Vastbinder determined that several of the registered owners were reported to be involved in drug trafficking in the Obion County area."

Paragraph 30 of the Proposed Findings of Fact, Proposed Conclusions of Law and Recommended Disposition states as follows:

> "The Affidavit submitted with this search warrant request indicated that there were several vehicles seen at the defendant's address from time to time, some registered to persons reportedly involved in drug trafficking in Obion County. The Affidavit further indicated that the defendant had drugs on his person when arrested, and also had books which, to an experienced law enforcement officer, indicated that defendant was trafficking heavily in drugs. It is submitted that an issuing Magistrate could justifiably deduce from these facts that there was probable cause that the defendant was keeping drugs at his home, and could thus issue a search warrant for the defendant's home."

The Magistrate ruled that counsel for the Defendant was prevented from examining the officers concerning the registration

of vehicles seen at the Defendant's address. Although there was no Franks v. Delaware, 438 U.S. 154 (1978), claim made at the time of the suppression hearing, such a claim was subsequently made. The Magistrate stated that the evidence of traffic was not considered in the Proposed Findings of Fact regarding the search of the vehicle. Apparently, however, the Magistrate considered this information in testing the validity of the Search Warrant.

Even though he ruled that he would not consider the vehicle registrations and prevented the defense from following this line of questioning, the Magistrate still considered this information.

The first paragraph of the Affidavit reveals no facts which permit a judicial officer making the probable cause determination to reach a judgment as to whether

the source of this information had any credible basis for the allegation that Sanders had been or would be involved in criminal conduct or that evidence of a crime would be found at his residence. All that is referred to is an unknown number of drive-by surveillances at unidentified times which yielded an unknown number of vehicle registrations of which Lt. Vastbinder determined that several were reported by some unidentified source as being involved in drug trafficking in some unidentified fashion. The Supreme Court in Illinois v. Gates, 462 U.S. 213, rehearing denied, 463 U.S. 1237 (1983), adopted a totality of the circumstances approach; however, questions of veracity and basis of knowledge remain relevant in determining probable cause.

What little factual information is contained in the first paragraph of the Affidavit in support of the search warrant

is stale. Lt. Vastbinder stated that he had "received information within the past two months that a Sanders' resident . . . was dealing in narcotics and stolen property." In regard to the staleness issue, the Supreme Court has stated:

> "While the statute does not fix the time within which proof of probable cause must be taken by the judge or commissioner, it is manifest that the proof must be a fact so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case." Sgro v. United States, 287 U.S. 206 (1932).

In the Affidavit before this Court, there is no factual information documenting a history of drug dealing over a significant time frame. There are no facts supporting the conclusion that Sanders possessed a quantity of drugs. There are no facts supporting an allegation of one sale of drugs much less ongoing criminal

activity or repeated sales of drugs. In the case before this Court, law enforcement authorities did not take the additional time to corroborate the allegations contained in the Affidavit of Complaint. To sustain a determination of probable cause, this Court would have to hold that a search warrant may be issued on the basis of mere suspicion of criminal conduct. Moreover, none of the information contained in the Affidavit refers to the location of contraband. While the Affiant concluded that contraband was at Sanders' residence, an Affidavit must set forth how the information leading to such a conclusion was obtained. The Affidavit provides no indication of where any alleged transactions took place, who they were with, or long they took. The Affidavit provides no information regarding corroborative evidence that Sanders kept drugs in his home.

Absent some additional corroboration, the discovery of contraband on a person or in his vehicle does not implicate an individual's home. Probable cause to believe a man has committed a crime does not necessarily give rise to probable cause to search his home.

D.

THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT APPLY TO THE SEARCH OF SANDERS' RESIDENCE

In the case of United States v. Leon, 468 U.S. 897, rehearing denied, 468 U.S. 1250 (1984), the Supreme Court adopted a partial good faith exception to the exclusionary rule. Specifically, the Court held that the exclusionary rule should be modified so as to not bar the use of evidence obtained by officers acting in reasonable reliance on a search warrant later

found to be unsupported by a probable cause.

To satisfy this standard, the officer must have "objectively reasonable grounds" for believing that the warrant was properly issued. In analyzing the good faith exception, the Court identified four situations in which a search pursuant to a warrant may be held to be illegal.

First, under Franks v. Delaware, 438 U.S. 154 (1978), a warrant which is sufficient on its face is invalid if based upon knowingly or recklessly made falsehoods in the Affidavit. Second, where the issuing Magistrate wholly abandoned his judicial role a resulting search remains outside the Leon exception. Id. at 923. This may occur when a Magistrate acts as mere rubber stamp for the police or as an adjunct law enforcement officer. Id. at 914. Third, an officer would not manifest an

objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render belief in its existence unreasonable. Finally, depending upon the circumstances, a warrant may be so facially deficient, that is, fail to particularize the place to be searched or the things to be seized, that the executing officers can not presume it to be valid.

In the case before this Court, there is no basis for the application of the good faith exception to the exclusionary rule. Deputy Sadler's testimony at the suppression hearing concerning when he observed the gun in Sanders' truck differed from the statement made in the Affidavit. The Defendant respectfully submits that the evidence seized as a result of the search warrant should be suppressed.

I. CONCLUSION

For the foregoing reasons, Defendant, William D. Sanders, respectfully requests this Court to grant his Petition in this cause for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to hear and decide his case on oral argument and Briefs.

RESPECTFULLY SUBMITTED this 7 day of January, 1992.

JAMES D. CAUSEY,
Attorney for Defendant
230 Adams Avenue
Memphis, Tennessee 38103
(901) 526-0206

J. CERTIFICATE OF SERVICE

I, James D. Causey, Attorney for Defendant, William D. Sanders, hereby certify that I have this 1 day of January, 1992, pursuant to Rule 28 of the Supreme Court Rules, caused to be served upon The Honorable Ed Bryant, United States Attorney, Federal Building, Memphis, Tennessee 38103, Mr. Joseph C. Murphy, Jr., Assistant United States Attorney, Federal Building, Memphis, Tennessee 38103, and the Solicitor General, Department of Justice, Washington, D. C. 20530, copies of the foregoing Petition for Writ of Certiorari filed by William D. Sanders, by placing copies of the same in the United States Mail, properly addressed, and with sufficient postage affixed thereto.

James D. Causey